

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

11020 Sun Center Drive, Rancho Cordova, California 95670-6114

PUBLIC HEARING

concerning

RESOLUTION TO AMEND
THE
CONDITIONAL WAIVERS OF WASTE DISCHARGE REQUIREMENTS
FOR
DISCHARGES FROM IRRIGATED LANDS
WITHIN THE
CENTRAL VALLEY REGION

On 11 July 2003, the Central Valley Regional Water Quality Control Board (Water Board) adopted Resolution No. R5-2003-0105, *Conditional Waivers of Waste Discharge Requirements for Discharges From Irrigated Lands Within the Central Valley Region* (Conditional Waivers) pursuant to Water Code Section 13269 for discharges to surface waters from irrigated lands.

The Water Board will consider adopting a Resolution, which would revise the Conditional Waivers in response to a ruling of the Sacramento County Superior Court on 9 May 2005. The proposed revision addresses the extent to which the Conditional Waivers are intended to apply to agricultural dominated waterways and constructed agricultural drains and other non-stream tributaries via the Basin Plan's Tributary Rule.

A public hearing concerning this matter will be held during the Water Board meeting, which is scheduled for:

DATE: **15 and 16 September 2005**
TIME: No earlier than **8:30 A.M.**
PLACE: Central Valley Regional Water Quality Control Board
11020 Sun Center Drive
Rancho Cordova, California 95670-6114

Persons wishing to comment on this noticed hearing item must submit such comments in writing to the Water Board no later than **23 August 2005**. Comments will be accepted on the proposed revisions only, not on the entire Conditional Waivers. Written comments submitted after **23 August 2005** will not be accepted and will not be incorporated into the administrative record unless allowed by the Water Board.

All interested persons may speak at the Water Board meeting and are expected to orally summarize their written comments. Oral testimony will be limited in time by the Water Board Chairman.

Anyone having questions on this matter should contact Ms. Wendy Cohen at (916) 464-5817. Interested parties may download related documents from the Water Board's Internet website at

NOTICE OF PUBLIC HEARING
LIMITED REVISIONS TO THE
CONDITIONAL WAIVERS OF
WASTE DISCHARGE REQUIREMENTS
FROM IRRIGATED LANDS
WITHIN THE CENTRAL VALLEY REGION

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http://www.waterboards.ca.gov/centralvalley/programs/irrigated_lands/index.html#News. Copies of these documents can also be obtained by contacting or visiting the Water Board's office at 11020 Sun Center Drive, #200, Rancho Cordova, California 95670-6114 weekdays between 8:00 a.m. and 5:00 p.m.

The procedures governing Water Board hearings may be found at Title 23, California Code of Regulations, Section 647 et seq. and is available upon request. Hearings before the Water Board are not conducted pursuant to Government Code section 11500 et seq. The procedures may be obtained by accessing http://www.waterboards.ca.gov/water_laws/index.html. Information on meeting and hearing procedures are also available on the Water Board's website at http://www.waterboards.ca.gov/centralvalley/board_meetings/mtgprocd.html or by contacting any one of the Water Board's offices. Questions regarding such procedures should be directed to Ms. Janice Tanaka at (916) 464-4839.

The meeting facilities will be accessible to persons with disabilities. Individuals requiring special accommodations are requested to contact Ms. Tanaka at (916) 464-4839 at least 5 working days prior to the meeting. TTY users may contact the California Relay Service at 1-800-735-2929 or voice line at 1-800-735-2922.

Please bring the above information to the attention of anyone you know who would be interested in this matter.



KENNETH D. LANDAU
Assistant Executive Officer

DRAFT
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

RESOLUTION NO. R5-2005-XXXX

AMENDING
RESOLUTION NO. R5-2003-0105
CONDITIONAL WAIVERS OF WASTE DISCHARGE REQUIREMENTS
FOR DISCHARGES FROM IRRIGATED LANDS
WITHIN THE CENTRAL VALLEY REGION
ATTACHMENT A2

WHEREAS, the California Regional Water Quality Control Board, Central Valley Region (Water Board) finds that:

1. On 11 July 2003, the Water Board adopted Resolution No. R5-2003-0105, *Conditional Waivers of Waste Discharge Requirements for Discharges From Irrigated Lands Within the Central Valley Region* (Conditional Waivers).
2. On 22 January 2004, the State Water Resources Control Board (State Water Board) adopted Order WQO 2004-0003, which upheld the Conditional Waivers and Monitoring and Reporting Programs with minor revisions.
3. On 26 February 2004, DeltaKeeper, WaterKeepers Northern California, Environment California, the Natural Resources Defense Council, Inc., and California Sportfishing Protection Alliance (collectively "DeltaKeeper"), filed a petition for peremptory writ of mandate in Sacramento County Superior Court (Court). Deltakeeper alleged that in approving the Conditional Waivers, the Water Board violated the Porter-Cologne Water Quality Control Act (Porter-Cologne Act), including California Water Code (CWC) Section 13269, and the California Environmental Quality Act (CEQA) by relying on a negative declaration instead of preparing an Environmental Impact Report (EIR).
4. On 3 March 2004, the California Farm Bureau Federation (Farm Bureau) also filed a petition for peremptory writ of mandate in Court. The Farm Bureau alleged that the scope of the required reports violated the Water Code, that the Water Board cannot require compliance with water quality objectives, that reports are subject to trade secret protection, and that access provisions of the Waiver were improper.
5. On 9 May 2005, the Court substantially upheld the Conditional Waivers, including upholding the Conditional Waivers with respect to CEQA and CWC Section 13269. The Court granted, in part, the Farm Bureau's petition with respect to staff access to private property for inspections and confidentiality of monitoring reports. The Court also remanded the matter of the "tributary rule" to agricultural dominated water bodies and constructed agricultural drains to the Water Board to clarify:

“...the extent to which the Waiver is intended to apply to agricultural dominated waterways and constructed agricultural drains and other non-stream tributaries; the extent to which the Waiver purports to impose receiving water limitations upon such water bodies; and, in light of the foregoing, the extent to which the Waiver may rely on application of the Tributary Rule for these purposes.” [Ruling, at page 77]

6. On 5 August 2005, the Water Board adopted Resolution No. R5-2005-XXXX amending Attachments B and C of the Conditional Waivers to address the issue of access to private property for inspections and confidentiality of monitoring reports.
7. On 16 September 2005, the Water Board adopted Resolution No. R5-2005-XXXX to add a new Attachment A2 to Resolution No. R5-2003-0105 to provide a clarification of the application of the Conditional Waivers to agricultural dominated waterways and constructed agricultural drains consistent with the Court Order.
8. Interested persons were notified that the Water Board would consider the adoption of a Resolution to clarify the Conditional Waivers consistent with Court Order and were provided an opportunity for a public hearing and an opportunity to submit written comments.
9. In a public hearing, all comments pertaining to the amended Resolution and its Conditional Waivers were heard and considered.

CALIFORNIA ENVIRONMENTAL QUALITY ACT

For purposes of adoption of this Resolution, the Water Board is the lead agency pursuant to CEQA (Public Resources Code sections 21100 et seq.). The Water Board adopted Resolution R5-2003-0105, which approved the Initial Study and adopted a Negative Declaration for the Conditional Waivers. The clarification of the application of the Conditional Waivers to agricultural dominated waterways and constructed agricultural drains to comply with the Court Order as set forth in Attachment A2 do not require the Water Board to prepare a subsequent or supplemental EIR or negative declaration because the revisions do not constitute substantial changes to the project as specified in Title 14 California Code of Regulations sections 15162 or 15163.

THEREFORE BE IT RESOLVED:

1. Resolution No. R5-2003-0105, dated 11 July 2003, adopting the Conditional Waivers and as revised on 22 January 2004 by State Water Board Order WQO 2004-0003 is hereby amended based on the above findings.

DRAFT RESOLUTION NO. R5-2005-XXXX
AMENDING RESOLUTION NO. R5-2003-0105,
CONDITIONAL WAIVER OF WASTE DISCHARGE
REQUIREMENTS FOR DISCHARGES FROM IRRIGATED
LANDS WITHIN THE CENTRAL VALLEY REGION
ATTACHMENT A2

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2. Attachment A2 of Resolution No. R5-2003-0105 has been added and is attached to this Resolution.

I, THOMAS R. PINKOS, Executive Officer, do hereby certify the foregoing is a full, true, and correct copy of a Resolution adopted by the California Regional Water Quality Control Board, Central Valley Region, on 15 September 2005.

THOMAS R. PINKOS, Executive Officer

Attachments: Attachment A2, Resolution No. R5-2003-0105

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

RESOLUTION NO. R5-2005-XXXX

CLARIFICATION OF RECEIVING WATER LIMITATIONS FOR DISCHARGES FROM
IRRIGATED LANDS TO SURFACE WATERS

CONDITIONAL WAIVERS OF
WASTE DISCHARGE REQUIREMENTS
FOR
DISCHARGES FROM IRRIGATED LANDS

In July 2003, the Regional Water Quality Control Board, Central Valley Region (Water Board) adopted *Conditional Waivers of Waste Discharge Requirements for Discharges From Irrigated Lands Within the Central Valley Region* (Conditional Waivers or Waiver). The State Water Resources Control Board (State Water Board) upheld the Conditional Waivers with some revisions. Various parties filed petitions seeking writs of administrative mandamus. On 10 May 2005, the Sacramento County Superior Court issued a ruling in the matter of *Deltakeeper, et al. v. California Regional Water Quality Control Board, Central Valley Region, et al.*, Case No. 04CS00235, and *California Farm Bureau Federation, et al. v. State Water Resources Control Board, et al.*, Case No. 04CS00264 (Court Order). In that ruling, the court remanded the matter to the Water Board to clarify

“...the extent to which the Waiver is intended to apply to agricultural dominated waterways and constructed agricultural drains and other non-stream tributaries; the extent to which the Waiver purports to impose receiving water limitations upon such water bodies; and, in light of the foregoing, the extent to which the Waiver may rely on application of the Tributary Rule for these purposes.” [Ruling, at page 77]

This Attachment A2 has been prepared to clarify these issues. It was prepared pursuant to the Court Order and is intended solely as clarification of the Conditional Waivers and does not have any other regulatory effect.

1. Application of the Conditional Waivers to Agricultural Dominated Waterways and Constructed Agricultural Drains.

The Porter-Cologne Water Quality Control Act (Porter-Cologne Act) [California Water Code (CWC) Division 7] defines the “waters of the state” as “any surface water or groundwater, including saline waters, within the boundaries of the state”. (CWC § 13050(e).) Consistent with that definition, “agricultural dominated waterways” and “constructed agricultural

drains”¹ are waters of the state because they are surface waters within the boundaries of the state. The Conditional Waivers regulate discharges of waste from irrigated lands to all surface “waters of the state,” including agricultural dominated waterways and constructed agricultural drains.

2. Application of Receiving Water Limitations to Agricultural Dominated Waterways and Constructed Agricultural Drains.

The Porter-Cologne Act requires the Water Boards to adopt water quality control plans, also called Basin Plans, for each region. The Basin Plan must (1) identify the beneficial uses of the waters to be protected, (2) establish “water quality objectives” to protect those uses, and (3) establish implementation programs for achieving the objectives. In addition, the federal Clean Water Act (CWA) requires the state to adopt water quality standards that include designated uses, water quality criteria, and an anti-degradation policy for “waters of the United States.”² Where the state does not act, the federal Environmental Protection Agency (US EPA) adopts water quality standards for the state. The beneficial uses and water quality objectives in the Basin Plan, the applicable state water quality control plans and policies, and the National Toxics Rule and California Toxics rules adopted by US EPA constitute the water quality standards for “waters of the United States.” (CWC §§ 13142, 13240, 13241, 13242.) All surface waters that are “waters of the U.S.” are necessarily also “waters of the state.”

The Conditional Waivers include Receiving Water Limitations that implement the applicable water quality objectives and water quality standards for all surface waters of the state within the Central Valley Region. Because agricultural dominated waterways and constructed agricultural drains are waters of the state, the Receiving Water Limitations in the Conditional Waivers apply to them.

3. Determination of applicable beneficial uses of water bodies that receive discharges from irrigated lands, including application of the Tributary Rule.

There are many ways that beneficial uses can apply to waters of the state. The most relevant of these with regard to the Conditional Waivers are the following:

¹ For the purposes of this waiver, a "constructed agricultural drain" is a water body that conveys drainage from agricultural operations and was constructed in a location where no natural water body (including intermittent swales, etc.) existed prior to the construction activity. Every other water body is a "stream" under the terms of the tributary rule, whether it has been modified for agricultural discharge conveyance, flood control, water supply, or other purposes or not. The Court Order also refers to “other non-stream tributaries.” The Regional Water Board is not aware of any “other non-stream tributaries” that convey agricultural drainage.

² U.S.C.A. §1362(7) (FWPCA §502(7)); 40 C.F.R. §122.2.

- (1) The Basin Plan designates beneficial uses of specifically listed individual water bodies and groups of water bodies.³ The Water Board has adopted two Basin Plans: the Water Quality Control Plan for the Sacramento and San Joaquin Rivers (4th Ed. 1998) and the Water Quality Control Plan for the Tulare Lake Basin (2nd Ed. 1995).
- (2) The State Water Board can adopt statewide plans and policies for water quality control that designate beneficial uses for specific water bodies and groups of water bodies. (CWC §§13140, 13170.)
- (3) The Basin Plan designates beneficial uses of tributary streams that are not specifically listed in the Basin Plan by reference to the named waters to which they are tributary. (This is known as the “tributary rule” and is discussed further below.)
- (4) Beneficial uses can be attributed by operation of law. (See, e.g. 33 U.S.C.A §1251(a)(2) (FWPCA §101(a)(2). The federal CWA requires that “waters of the United States” be protected for the beneficial uses of fishing and swimming.)⁴
- (5) Beneficial uses that actually exist in a water body, or have existed since at least 1975, must generally be protected even if they are not formally designated in a plan or policy. (See, e.g. State Water Board Resolution No. 68-16 (i.e., the Antidegradation Policy) and 49 C.F.R. §131.12.)

The “tributary rule” in the two Central Valley Basin Plans provides as follows:

“Existing and potential beneficial uses which currently apply to surface waters of the basins are presented in Figure II-1 and Table II-1. The beneficial uses of any specifically identified water body generally apply to its tributary streams. In some cases a beneficial use may not be applicable to the entire body of water. In these cases the Regional Water Board’s judgment will be applied. It should be noted that it is impractical to list every surface water body in the Region. For unidentified water bodies, the beneficial uses will be evaluated on a case-by-case basis.” Basin Plans, page II-2.00.

The “tributary rule” establishes beneficial uses for tributary streams that are not individually listed in the Basin Plan. The Water Board has concluded that, because of its use of the term “tributary streams,” the “tributary rule” applies only to “streams” and not to “constructed agricultural drains.” The beneficial uses of constructed agricultural drains are not, therefore, determined by the tributary rule, but by the other methods for applying beneficial uses. For example, a particular constructed agricultural drain may have existing beneficial uses, uses designated by a plan or policy, and/or fishing and swimming uses attributed by operation of law under the CWA.

³ This list includes some constructed agricultural drains, e.g. the Delta-Mendota Canal.

⁴ In *Headwaters, Inc. v. Talent Irrigation District* (9th Cir. 2001) 243 F.3d 526, the court held that irrigation canals are waters of the United States if they are tributary to natural creeks.

4. Implementation of the Receiving Water Limitations in the Conditional Waivers.

The Conditional Waivers require all Dischargers to comply with the Receiving Water Limitations. Some of the Receiving Water Limitations explicitly refer to adverse impacts to beneficial uses. Those Receiving Water Limitations require a determination of the beneficial uses for the applicable receiving water bodies.

Attachment A to the Conditional Waivers lists the water quality objectives that apply to specific water bodies and those that apply to all water bodies in the Central Valley Region. As explained above, if the discharge is to a stream (i.e., any water body other than a constructed agricultural drain) that is not specifically listed, the applicable beneficial uses for that stream include those in the downstream listed water body. In addition, the other methods of determining beneficial uses described above must be considered for all water bodies. It must also be noted that the Receiving Water Limitations protect the beneficial uses of all water bodies within the Central Valley Region that ultimately receive the dischargers' waste. Therefore, regardless of the beneficial uses that apply to the water body that directly receives the waste discharge, dischargers must also ensure that their discharges do not impact the beneficial uses of any downstream water bodies.